CHARLES F. PREUSS (State Bar No. 45783)
THOMAS W. PULLIAM, JR. (State Bar No. 46322)
BENJAMIN J. HOLL (State Bar No. 200630)
DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, California 94105-2235
Telephone: (415) 591-7500
Facsimile: (415) 591-7510

Attorneys for Defendants
JOHNSON & JOHNSON, MCNEIL CONSUMER HEALTHCARE, a Division of MCNEIL-PPC, INC., MCKESSON CORPORATION, and WAL-MART STORES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THOMAS B. GAINES, a deceased minor child by and through his personal representative(s) and/or successor(s) in interest; DIANA L. GAINES, individually, as Executor of the Estate of Thomas B. Gaines, and as Thomas B. Gaines' personal representative and successor in interest; GARY D. GAINES, individually and as Thomas B. Gaines' personal representative and successor in interest; and THE ESTATE OF THOMAS B. GAINES,

Plaintiffs,

v.

JOHNSON & JOHNSON, a New Jersey corporation; MCNEIL CONSUMER & SPECIALTY PHARMACEUTICALS, a Division of MCNEIL-PPC, INC., a New Jersey corporation; MCKESSON CORPORATION, a Delaware corporation; WAL-MART STORES, INC., a Delaware corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No. CV 07-05503 PJH

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

Time: 9:00 a.m.
Date: January 16, 2008
Location: Court Room 3

Complaint Filed: November 3, 2006

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50 Fremont Street, 20th Floor
San Francisco, CA 94105

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50 Fremont Street, 20th Floor
San Francisco, CA 94105

Defendants Johnson & Johnson, McNeil Consumer Healthcare Division of McNeil-PPC, Inc. (erroneously sued as McNeil Consumer & Specialty Pharmaceuticals, a Division of McNeil-PPC, Inc.) ("McNeil"), Wal-Mart Stores, Inc. ("Wal-Mart"), and McKesson Corporation ("McKesson") (collectively, "Defendants") respond to Plaintiffs' Motion to Remand, as follows:

I. INTRODUCTION

Plaintiffs' joinder of McKesson as a distributor of Children's Motrin Suspension products was a transparent attempt to avoid removal. Plaintiffs will not be able to prove that McKesson distributed the Children's Motrin they claim to have bought from Wal-Mart. Indeed, after a year of discovery, Plaintiffs have no evidence connecting McKesson to the purchase they allegedly made. Absent such evidence, there is no basis for their claims against McKesson and this case properly belongs in federal court under 28 U.S.C. § 1441. Removal was proper and Plaintiffs' improper joinder of McKesson precludes remand. *See Attorneys Trust v. Videotape Computer Prod., Inc.*, 93 F.3d 593, 598 (9th Cir. 1996). Plaintiffs' Motion to Remand should be denied.

II. PROCEDURAL POSTURE

A. Plaintiffs' State Court Case

On November 3, 2006, Plaintiffs filed a personal injury/wrongful death action in the Superior Court of California, County of San Francisco, captioned *Thomas B. Gaines, et al. v. Johnson & Johnson, et. al.*, Case Number CGC-06-457600. Plaintiffs are residents of North Carolina and seek damages for the personal injury and death Thomas B. Gaines suffered after allegedly contracting Stevens-Johnson Syndrome, which Plaintiffs claim was caused by Children's Motrin. (Complaint ¶¶ 12-14.) Plaintiffs allege causes of action for Strict Products Liability, Negligence, Breach of Warranty, and Wrongful Death against Johnson & Johnson, a New Jersey corporation with its principal place of business in New Jersey (Complaint ¶ 5), McNeil, a New Jersey corporation with its principal place of business in Pennsylvania (Complaint ¶ 6), and Wal-Mart, a

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50 Fremont Street, 20th Floor
San Francisco, CA 94105

Delaware corporation with its principal place of business in Arkansas (Complaint ¶ 8). Plaintiffs' complaint asserts these same claims against McKesson, a Delaware corporation with its principal place of business in San Francisco, California (Complaint ¶ 7).

Plaintiffs claim that Thomas B. Gaines was given Children's Motrin on or around September 28, 2004, and that it caused him to develop Stevens-Johnson Syndrome. (Complaint ¶ 11, 15). Plaintiffs now claim that the Children's Motrin at issue was purchased at a particular Wal-Mart Store ("Store 1209") about March 2004, and that McKesson distributed the Children's Motrin to this Wal-Mart Store. On January 3, 2007, Defendants served discovery seeking the factual basis on which Plaintiffs base their claim that McKesson distributed the Children's Motrin at issue. (See Defendants First Set of Special Interrogatories, Form Interrogatories, Requests for Admission, and Requests for Production of Documents attached as Exhibit B to the Declaration of Thomas W. Pulliam, filed in support of removal ("Pulliam Dec.").) Plaintiffs served deficient responses to this discovery on February 12, 2007, and Defendants filed a motion to compel adequate responses on March 29, 2007. (*Id.*)

Prior to the hearing on Defendants' motion to compel, Plaintiffs provided supplemental discovery responses on May 3, 2007. In these supplemental discovery responses, Plaintiffs asserted, without further explanation, that three news articles provided the basis for their claim that McKesson distributed Children's Motrin to Wal-Mart Store 1209. One article, from April 2002, stated that McKesson was honored as one of Wal-Mart's "Suppliers of the Year." (Pulliam Dec. ¶12, Ex. H.) Two November 2006 articles stated McKesson had renewed an agreement to be Wal-Mart's primary, but not exclusive, supplier of "branded pharmaceutical products," and that the relationship between McKesson and Wal-Mart began in 1988. (*Id.*) However, the articles provided no evidence that McKesson sold any *Children's Motrin* to Wal-Mart generally, or Store 1209 in particular, during the relevant time. (*Id.*)

On or about August 6, 2007, McKesson and Wal-Mart confirmed that, during the

period of January 1, 2004 through September 28, 2004, McKesson had not distributed any Children's Motrin to Wal-Mart Store 1209, where Plaintiffs had purchased the Children's Motrin at issue. (McKesson's Response to Plaintiffs' Special Interrogatory No. 1, attached to Pulliam Dec. as Ex. F; Wal-Mart's Response to Plaintiffs' Special Interrogatory No. 1, attached to Pulliam Dec. as Ex. G.)

Thereafter, on October 5, 2007, Beverly Taylor, the Wal-Mart Pharmacy Manager for the pharmacy at Wal-Mart Store 1209, signed a declaration ("Taylor Declaration") in which she confirmed that it is "extremely unlikely" that any Children's Motrin suspension product purchased before January 2004, from McKesson or anyone else, would have still been on the shelf and available for sale at Store 1209 in March 2004. Defendants received the Taylor Declaration on October 9, 2007. (Pulliam Dec. ¶ 13.)

B. Defendants' Removal

Taken together, confirmation by McKesson and Wal-Mart that McKesson did not distribute Children's Motrin to Wal-Mart Store 1209 between January 1, 2004 and September 28, 2004 and the Taylor Declaration, demonstrate that there was no possibility that Plaintiffs could prove it was more likely than not the Children's Motrin at issue came from McKesson. Accordingly, on October 29, 2007, twenty days after receiving the Taylor Declaration, Defendants removed Plaintiffs' case to the United States District Court, Northern District of California (San Francisco Division), pursuant to 28 U.S.C. § 1441.

Under § 1441(b), the district court may exercise jurisdiction on the basis of diversity if "none of the parties in interest "*properly joined* and served as defendants is a citizen of the state in which such action is brought." 28 U.S.C. § 1441(b) (emphasis added); *see also* 28 U.S.C. § 1332(a). Although McKesson is a California defendant, Defendants established in their Notice of Removal that Plaintiffs fraudulently joined McKesson, as there is no possibility that Plaintiffs can prove it is more likely than not that the Children's Motrin they purchased came from McKesson. (Notice of Removal at 5-6; *Adams v. FedEx Corp.*, 2005 U.S. Dist. Lexis 40408, *7 (N.D. Cal. 2005).)

III. LEGAL ARGUMENT

A. Defendants' Removal Was Timely

Pursuant to 28 U.S.C. § 1446(b), a notice of removal must "be filed within thirty days after the receipt by the defendant…of a copy of the initial pleading setting forth the claim or relief upon which such action or proceeding is based[.]" However, "[i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant…of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable[.]" 28 § U.S.C. § 1446(b). Additionally, Section 1446(b) requires that any case to be removed on diversity grounds be removed within one year after the commencement of the action. *Id.*

Thus, 28 U.S.C. § 1446(b) "provides two thirty-day windows during which a case may be removed – during the first thirty days after the defendant receives the initial pleading or during the first thirty days after the defendants receives a paper 'from which it may first be ascertained that the case is one which is or has become removable' if 'the case stated by the initial pleading is not removable.'" *Harris v. Bankers Life and Casualty Co.*, 425 F.3d 689, 692 (9th Cir. 2005), quoting 28 U.S.C. § 1446(b). Therefore, "even if a case were not removable at the outset, if it is rendered removable by virtue of a change in the parties or other circumstance revealed in a newly-filed 'paper,' then the second thirty-day window is in play." *Id.* at 694.

Importantly, "notice of removability under § 1446(b) is determined through examination of the four corners of the applicable pleadings, not through subjective knowledge or a duty to make further inquiry." *Id.; see also Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) ("we don't charge defendants with notice of removability until they've received a paper that gives them enough information to remove.").

Here, the Complaint disclosed no basis for removal because Plaintiffs alleged,

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50 Fremont Street, 20th Floor
San Francisco, CA 94105

inter alia, that the Children's Motrin at issue was "designed, manufactured, marketed, distributed and sold OTC by" McKesson. (Complaint ¶ 15.) Accordingly, the "first thirty-day window" for removal did not exist here. In January 2007, Defendants' counsel began seeking information from both Plaintiffs and Defendants themselves to determine whether the case was removable based on the fraudulent joinder of McKesson. Defendants learned through discovery that Plaintiffs purchased the Children's Motrin from Wal-Mart Store 1209 in approximately March 2004, but that McKesson had not distributed any Children's Motrin to Store 1209 at any point in 2004 prior to September 28. Further, Defendants learned that the only information Plaintiffs relied upon to support their claim against McKesson was three news articles that stated McKesson was a primary supplier of "branded pharmaceutical products" to Wal-Mart, and that the relationship between McKesson and Wal-Mart began in 1988. The articles provided no indication that McKesson sold any *Children's Motrin* to Wal-Mart generally, or Store 1209 in particular, during the year 2004.

Not until October 9, 2007, upon receipt of the Taylor Declaration, stating it is "extremely unlikely" that any Children's Motrin purchased by Store 1209 before January 2004 would have still been on the shelves and available for sale in March 2004, were Defendants able to determine that there was no possibility that Plaintiffs could establish a cause of action against McKesson. Thus, the "second thirty-day window" for removal opened on October 9, 2007. Prior to receiving the Taylor Declaration, Defendants could only be sure that any Children's Motrin supplied to Wal-Mart Store 1209 in 2004 (before September 28) was not supplied by McKesson. However, Defendants *could not* be sure that the Children's Motrin Plaintiffs purchased was not supplied by McKesson prior to January 1, 2004, still on the shelf available for sale in March 2004 until receipt of the Taylor Declaration.

Prior to receiving the Taylor Declaration, the case was not removable. Once Defendants received the declaration, it became removable based on McKesson's fraudulent joinder. Prior to receipt of the Taylor Declaration, it could not be concluded

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that there was "no possibility" that Plaintiffs could establish a cause of action against McKesson because it was unclear whether Children's Motrin supplied by McKesson to Wal-Mart Store 1209 prior to 2004 might still have been on the shelf and available for sale in March 2004.[1] The Taylor Declaration received October 9, 2007 foreclosed any possibility that Plaintiffs could establish that it was more likely than not that the Children's Motrin at issue came from McKesson, and thus the second thirty-day window for removal was triggered. Defendants timely removed the case twenty days later on October 29, 2007.

Plaintiffs' reliance on *Rico-Chinn v. Prudential Ins. Co. of Am.*, 2005 U.S. Dist. Lexis 23132 (N.D. Cal. 2005), for the proposition that Defendants cannot "receive" the Taylor Declaration within the meaning of 28 § U.S.C. § 1446(b), is misplaced. In *Rico-Chinn*, the complaint did not reveal the amount of damages plaintiff-insured sought and defendant-insurer waited to remove the case until receiving discovery responses from plaintiff which revealed the damages exceeded the jurisdictional amount. Plaintiff argued that defendant had 30 days from the date the complaint was filed to remove the case because defendant's own records, *in existence before the lawsuit was filed*, contained the information necessary to determine the amount in controversy, and that those pre-existing records constituted "other paper" within the meaning of Section 1446(b). The court rejected plaintiff's argument and denied remand, holding that "defendant was not in 'receipt' of an 'other paper' by reason of its possession of its own records," which existed prior to the lawsuit and were created for purposes unrelated to the lawsuit. *Id.* at *9. Here, the Taylor Declaration was not in existence when Plaintiffs filed their lawsuit; the declaration was not signed until October 5, 2007. Moreover, the Taylor Declaration was

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[1]Plaintiffs argue that Defendants' receipt of Plaintiffs' three news articles and/or McKesson's and Wal-Mart's discovery responses, which confirmed that no Children's Motrin was distributed by McKesson to Wal-Mart Store 1209 in 2004, triggered the second 30-day removal window. (Removal at 8.) This argument is meritless. The articles themselves have nothing to do with distribution of this product to this store. And, the Taylor Declaration was needed to establish that there was no possibility Plaintiffs could establish a cause of action against McKesson.

DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105

prepared for the sole purpose of this litigation, and was not part of Defendants' business records.

Accordingly, as the Defendants removed the case within 30 days after receiving the Taylor Declaration, the removal was timely.

B. Remand Is Not Warranted Because Plaintiffs Fraudulently Joined McKesson

1. Controlling Legal Standards

Under 28 U.S.C. § 1441(a), a civil action brought in a state court over which a federal court has original jurisdiction may be removed by a defendant to the appropriate district court. Section 1441(b), however, imposes a limitation on actions removed based on diversity jurisdiction. As noted, under Section 1441(b), removal is appropriate "if none of the parties in interest *properly joined* and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (emphasis added). Known as the "forum defendant rule," the Rule "reflects the belief that [federal] diversity jurisdiction is unnecessary because there is less reason to fear state court prejudice against the defendants if one or more of them is from the forum state." *Spencer v. United States Dist. Court for the N. Dist. of California*, 393 F.3d 867, 870 (9th Cir. 2004), *quoting* Erwin Chemerinsky, *Federal Jurisdiction* § 5.5, at 345 (4th ed. 2003).

Because the Rule is procedural – not jurisdictional – it is inapplicable when a forum defendant is fraudulently or otherwise improperly joined. *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 936 (9th Cir. 2006). Joinder is fraudulent where the defendant has "no real connection [to] the controversy" because the allegations against the defendant are "*without any reasonable basis in fact*." *Maffei v. Allstate California Ins. Co.*, 412 F.Supp.2d 1049, 1053 (E.D. Cal. 2006), citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921) (emphasis added). Stated another way, "[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent and may be disregarded." *McCabe v. Gen. Goods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). In determining whether joinder was fraudulent, a court "must examine

whether there is any possibility that the plaintiff will be able to establish a cause of action against the party in question." *Adams, supra,* 2005 U.S. Dist. Lexis 40408 at *7.

When examining whether a defendant is fraudulently joined, "[t]he court may pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available." *Maffei*, 412 F.Supp.2d at 1053 (citations omitted); *see also Griggs v. State Farm Lloyds*, 181 F.3d 694, 700 (5th Cir. 1999) ("A federal court may consider 'summary judgment-type evidence such as affidavits and deposition testimony' when reviewing a fraudulent joinder claim."). However, it is well settled in the Ninth Circuit that the "propriety of removal is determined at the time of removal – not according to factual assertions stated at a later date." *Ritchey v. Upjohn Drug Co.,* 139 F.3d 1313, 1318 (9th Cir. 1998). To that end, while a fraudulent joinder claim may be resolved by piercing the pleadings, "whether or not a plaintiff may recover on the stated claims against the resident defendants does *not* include consideration of whether, with further discovery, the plaintiff may uncover a factual basis for its claims[.]" *Bellecci v. GTE Sprint Communications Corp.*, 2003 U.S. Dist. Lexis 640, *10 (N.D. Cal. 2003) (original emphasis).

Thus, a defendant "is entitled to present the facts showing the joinder to be fraudulent," and if the facts reveal that joinder is fraudulent, the defendant may be dismissed from the action under Fed. R. Civ. P. 21.[2] Removing Defendants did exactly that.

2. Defendants Met Their Removal Burden By Establishing That McKesson Has No Connection To Plaintiffs' Controversy

To hold a defendant liable for injury caused by a particular product, "there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product." *Garcia v. Joseph Vince Co.*, 84 Cal.App.3d 868, 874

[2] Under Fed. R. Civ. P. 21, "[p]arties may be dropped or added by order of the Court on motion of any party…at any stage of the action and on such terms as are just." *Gasnick v. State Farm Ins. Co.*, 825 F.Supp. 245, 248-249 (E.D. Cal. 1992).

(1978). Here, no such proof exists and the undisputed evidence demonstrates that there is no possibility that Plaintiffs can establish that it was more likely than not that McKesson was "in some way responsible" for the Children's Motrin at issue.

Plaintiffs' claim that the Taylor Declaration raised a disputed fact for the State Court to resolve because the declaration only states the Children's Motrin was purchased from Johnson & Johnson, but it does not state that McKesson did not distribute it. (Plaintiffs' Motion to Remand ("Remand") at 13.) Plaintiffs ignore the other evidence supporting removal. The Taylor Declaration is not directed to whether McKesson distributed Children's Motrin in 2004. That issue was resolved by McKesson's and Wal-Mart's discovery responses – these responses unequivocally stated McKesson did not distribute any Children's Motrin to Wal-Mart Store 1209 in 2004 (before September 28). (McKesson's and Wal-Mart's Responses to Plaintiffs' Special Interrogatory No. 1, attached to Pulliam Dec. as Exs. F and G.) The significance of the Taylor Declaration is Ms. Taylor's attestation that it is "extremely unlikely" that any Children's Motrin purchased by Wal-Mart Store 1209 before 2004 would have been on the shelves and available for sale in March 2004, when Plaintiffs allegedly purchased the Children's Motrin at issue. Together, the declaration and the discovery responses of McKesson and Wal-Mart create an *undisputed* fact that the Children's Motrin at issue did not come from McKesson. Plaintiffs' only evidence – the three news articles – do not create a disputed fact because none of the articles state that McKesson distributed Children's Motrin to Wal-Mart Store 1209 in 2004 before the Plaintiffs allegedly purchased the Children's Motrin at issue.

Plaintiffs also argue that the Taylor Declaration does not establish that there is no possibility for recovery against McKesson because it "fails to account for the possibility that Plaintiffs could have purchased the Children's Motrin in April, five months before September 2004." (Remand at 18.) To the extent Plaintiffs are insinuating that the Children's Motrin at issue may have been purchased later than March 2004, the argument is illogical and untenable. If it is "extremely unlikely" that Children's Motrin purchased

by Wal-Mart Store 1209 prior to January 2004 would have still been on the shelf in March 2004, it would be even *more* unlikely to be on the shelf in April 2004 or later.

Plaintiffs claim to have purchased the Children's Motrin at issue in March 2004 from Wal-Mart Store 1209, but the undeniable evidence establishes (1) Store 1209 did not receive any Children's Motrin from McKesson in 2004, and (2) it would be extremely unlikely that any Children's Motrin received from McKesson before 2004 would still be on the shelf and available for sale in Store 1209 in March 2004. The allegations against McKesson are, thus, "without any reasonable basis in fact." *Maffei, supra,* 412 F.Supp.2d at 1053. There is no possibility that Plaintiffs can prove more likely than not the Children's Motrin they purchased came from McKesson. The Court should disregard the citizenship of McKesson and deny Plaintiffs' Motion to Remand.

IV.
CONCLUSION

Defendants respectfully request that the Court deny Plaintiffs' Motion to Remand.

Dated: December 21, 2007

Respectfully submitted,
DRINKER BIDDLE & REATH LLP

THOMAS W. PULLIAM, JR.

Attorneys for Defendants
JOHNSON & JOHNSON, MCNEIL CONSUMER HEALTHCARE, a Division of MCNEIL-PPC, INC., MCKESSON CORPORATION, and WAL-MART STORES, INC.

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